

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations
(Pueblo, Colorado))

) MM Docket No. 93-191
) RM-8088
)
)

To: Chief, Allocations Branch
(Stop Code 1800D5)

**JOINT REPLY COMMENTS OF THE UNIVERSITY OF SOUTHERN
COLORADO AND SANGRE DE CRISTO COMMUNICATIONS, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
Summary of Argument	ii
Preliminary Statement	2
Significant Public Interest Benefits Would Result From FCC Approval of Petitioners' Channel Swap Proposal	4
Inclusion of the Cheyenne Mountain Permit Is Critical to the Public Interest Associated With the Proposed Channel Exchange	10
The Proposed Channel Swap Will Result In A Net Improvement of Service	14
The Noncommercial Service Gains Associated With KTSC(TV)'s Proposed Translator Service Are Not Speculative	21
Extension of the Cheyenne Mountain Permit And the Authorization's Inclusion in the Proposed Channel Exchange Are Warranted	25
Conclusion	30

SUMMARY OF ARGUMENT

This is a simpler case than the mountains of paper it has generated would suggest. It involves a proposed intraband channel exchange which would result in substantial and tangible benefits to both its noncommercial and commercial proponents.

In particular, KTSC(TV) would receive a \$1 million contribution which would be used to improve its noncommercial educational programming and to institute new television translator service in currently-unserved areas; it would also gain enhanced technical facilities and capabilities. KOAA-TV would, in turn, gain enhanced competitive service capabilities within its home television market. The proposed swap, in other words, squarely meets the public interest criteria of the Commission's channel exchange rules.

The arguments of KKTU and KRDO-TV in opposition fail to rebut the swap's clear public interest benefits. Instead, they continue their ongoing concentration on collateral issues with claims already addressed and fully rebutted by Petitioners. Their shopworn arguments do not alter the clear public interest merits of the proposed channel exchange.

In particular, the Joint Reply Comments establish that:

- The enhancement to KOAA-TV's service is a benefit virtually identical to that associated with other channel exchanges, not a circumvention or violation of the Commission's minimum spacing requirements.

- The swap will produce a net overall gain in off-air service which clearly offsets any de minimis loss of off-air commercial service. Translators, cable television systems and satellite service ensure that the small number of persons affected will continue to have access to adequate television broadcast service following the swap.
- Service gains associated with proposed translator service are not speculative given the practical improbability of displacement and NTIA's express recognition that translators afford the optimal means of serving the areas affected.
- KTSC(TV)'s Cheyenne Mountain Permit is and continues to be a valid authorization. That it might be implemented by a commercial rather than a noncommercial entity cannot support its invalidation: the shortspacing waiver it includes involved the Commission's technical rules and cannot be altered based merely on the identity of the entity ultimately implementing the authorization.
- KTSC(TV)'s Cheyenne Mountain Permit must be included in the swap. Such action would be fully consistent with Commission precedent, and is necessary to ensure that the commercial swap proponent as well as the noncommercial proponent benefits from the channel exchange.

The Commission must not let the volume of pleadings obfuscate the fundamental question here: whether the proposed channel swap complies with the requirements of the Commission's rules. The answer, confirmed by the strong affirmative support of numerous concerned community leaders, is a resounding "Yes." KOAA-TV's commercial competitors must not be allowed to scuttle a proposal which satisfies all public interest criteria by inundating the Commission with numerous pleadings lacking factual and legal support.

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The University of Southern Colorado (the "University"), licensee of
Station KTSC(TV), Channel 8, Pueblo, Colorado, and Sangre de Cristo
Communications, Inc. ("SCC"), licensee of Station KOAA-TV, Channel 5, Pueblo,
Colorado (collectively, the "Petitioners"), by their attorneys, submit their Joint Reply
Comments in response to the comments filed^{1/} in the above-captioned proceeding.^{2/}

1/ The only two other broadcasters commenting in this proceeding were the other
network affiliates in the Colorado Springs-Pueblo market -- Pikes Peak Broadcasting
Company ("Pikes Peak"), licensee of Stations KRDO-TV, Colorado Springs,
Colorado and KJCT-TV, Grand Junction, Colorado, and KKTV, Inc. ("KKTV"),
licensee of Station KKTV(TV), Colorado Springs, Colorado (collectively,
"Commercial Competitors"). Numerous concerned community leaders, including
U.S. Congressmen and Senators, have indicated their strong support for the proposed
swap. See page 8, note 19, *infra*.

2/ See Notice of Proposed Rule Making, MM Docket No. 93-191 (July 13, 1993)
(the "Notice"). Petitioners' Joint Comments herein fully addressed the Commission's
concerns with their proposed channel swap. These Joint Reply Comments also
address these matters in responding to the comments submitted by Pikes Peak and
KKTV.

Preliminary Statement

Over the past year, the Commercial Competitors beleaguered the University and SCC with challenges to the Cheyenne Mountain Permit, Television Translator K15BX and the channel swap in an obvious effort to prevent increased competition in the Colorado Springs-Pueblo market.^{3/} Their comments herein continue the Commercial Competitors' ongoing opposition to Petitioners' channel exchange proposal, attempting to dignify their year of anti-competitive behavior by asserting that their conduct is and has been public interest-oriented.^{4/} The

3/ Since the filing of Petitioners' Joint Petition for Issuance of Notice of Proposed Rulemaking to Exchange Channels (the "Joint Petition") on September 8, 1992, the Commercial Competitors have filed numerous pleadings which collaterally attack the proposed swap. Their challenges ranged from petitions for reconsideration of routine matters which were of no interest to them prior to the Joint Petition (e.g., applications for modification of facilities and extension of construction permits) to petitions for issuance of show cause orders seeking revocation of the construction permit authorizing relocation of KTSC(TV)'s transmitter (FCC File No. BPET-900122KE; the "Cheyenne Mountain Permit"). Because the Commercial Competitors' initiation of these proceedings was obviously motivated by and the issues all ultimately relate to the proposed channel swap, Petitioners have requested consolidated resolution of these matters in this proceeding. See Joint Motion to Consolidate Proceedings (August 26, 1993).

4/ Notably absent from the Commercial Competitors' extensive pleadings is any showing that the challenged action or authorization would or does cause harm to their stations' operations. Instead, their arguments have been nothing more than speculation and innuendo. See, e.g., Petitioners' Joint Consolidated Opposition to Petitions for Issuance of Order to Show Cause (January 8, 1993) ("Joint Consolidated Show Cause Opposition") at 10 - 13; Petitioners' Joint Opposition to Petition to Revoke and Deny CP Extension (March 4, 1993) at 7 - 9; University's Opposition to Petition to Deny Applications for New UHF Translators (August 31, 1993) at 3 - 5.

Commercial Competitors' actions, however, speak far louder than their words, and demonstrate that they are committed solely to their private interests.

The Commission, cognizant that competitors of the licensees or permittees proposing a channel exchange would most likely oppose the requested swap, has previously noted that:

[I]t is not envisioned that the Commission would determine that the proposal lacked the requisite public interest benefits because some other person could have entered into a better agreement, or because the proposal could increase competition in a given market. Rather, it would be incumbent on opposing commenters to show that the proposal before the Commission did not serve the public interest.^{5/}

In its comments, Pikes Peak indicates that its opposition to the extension, and even the existence, of the Cheyenne Mountain Permit is based solely on the possibility that it may be implemented by SCC, a commercial station.^{6/} Pikes Peak has thus clearly indicated that it opposes the channel exchange not because of public interest concerns but out of fear of increased competition. The Commission has spoken on this matter: it is not a sufficient reason to deny the proposed channel exchange.

5/ Amendment to the Television Table of Assignments to Change Noncommercial Educational Reservations (Notice of Proposed Rule Making), FCC 85-73, released March 8, 1985, at ¶ 12 (the "Channel Exchange NPRM").

6/ Pikes Peak Comments at 3, n.5.

Petitioners' Joint Comments clearly establish that the channel exchange they propose would result in significant commercial and noncommercial service benefits and thus is fully consistent with the public interest and the Commission's rules and policies governing channel exchanges.^{7/} In other words, the Commission can and should approve the channel exchange as proposed by Petitioners.

**Significant Public Interest Benefits
Would Result From FCC Approval
of Petitioners' Channel Swap Proposal**

The Joint Petition proposed a VHF intraband channel swap between the University and SCC which would result in significant public interest benefits. The specific operational components of the Petitioners' channel exchange proposal have been previously described and such description is hereby incorporated by reference.^{8/} The Notice, however, proposed a swap significantly different from Petitioners' initial proposal -- namely, the Notice's proposal did not include the Cheyenne Mountain Permit.

As indicated in the Joint Comments and reiterated herein, the Petitioners are interested in pursuing the channel swap only if their initial proposal is

^{7/} KKTv claims at page 15 of its Comments that the swap's approval requires a rule waiver. This is inaccurate: the swap complies with the Commission's rules and no waiver thereof is necessary.

^{8/} See Joint Comments at 2.

approved.^{9/} Approval of that channel swap would maximize public interest benefits because the service provided by both the noncommercial and commercial licensee would be improved. Without the Cheyenne Mountain Permit, SCC will not receive any service benefits from the channel exchange.^{10/} Such a result is neither desired by SCC nor consistent with the public interest.

Under Petitioners' proposal, the University will receive a monetary contribution of \$1,000,000.^{11/} The University proposes two specific uses for these monies: (1) to expand its current network of television translator stations; and (2) to

9/ See Joint Comments at 3, n.3. Unless otherwise indicated, any discussion herein about the channel exchange proposal refers to that proposal presented in the Joint Petition and supported in the Joint Comments.

10/ Joint Comments at 17, n.36; Engineering Statement of Cohen Dippell & Everist, P.C., dated September, 1992, Joint Petition Exhibit 2 ("Joint Petition Engineering Statement"), at 4. See also discussion infra.

11/ In its comments, Pikes Peak throws up yet another smokescreen by attempting to discount the benefits to the University of this contribution. In essence, Pikes Peak contends that because the University has not indicated that it needed additional funds to construct the proposed translators for the Western Slope, the money is of no consequence because the University is not in "financial need." See Pikes Peak Comments at 8-9. (Significantly, Pikes Peak previously challenged the University's financial qualifications. See University's Opposition to Petition to Deny, supra note 6, at 3-5. Now, however, it offers an equally frivolous contradictory argument.) Although this contribution is not necessary for KTSC(TV)'s continued operations, the University has earmarked the funds for particular projects which (a) it already had or (b) desired to pursue but did not have funds available to do so, such as an increase in programming offered and planned expansion of its translator network. The contribution, therefore, will allow the University to improve and enhance the service provided by KTSC(TV); thus, the public is benefitted. Moreover, the University is no different from other state institutions which always welcome relief from the budgetary constraints resulting from the state's need to parcel out limited resources to those numerous entities for which it must provide minimum funding.

enhance KTSC(TV)'s present roster of noncommercial, educational television programming.^{12/} As a direct consequence of the University's translator network expansion, the Western Slope of Colorado,^{13/} will receive its first over-the-air Colorado-based public television service.^{14/}

The University's use of a portion of the monies received from SCC under the channel exchange to expand KTSC(TV)'s current public broadcast service programming will allow the station to respond to the concerns and issues of particular interest to some of the smaller communities in KTSC(TV)'s service area. Indeed, these programming benefits to new Western Slope viewers (as well as current KTSC(TV) viewers) exemplify the public interest gains associated with Petitioners' swap proposal.

^{12/} Joint Petition at 2.

^{13/} Television Translator K59CE, Cortez, Colorado (in the southwestern corner of the State) currently retransmits the programming of Station KNME-TV, a noncommercial Albuquerque, New Mexico station. Except for this translator service, the Western Slope currently only receives noncommercial television service via satellite delivery. Since this station is licensed to an out-of-state institution, these are clear benefits of the proposed translator service for the Western Slope from the University's in-state educational facility notwithstanding K59CE.

^{14/} The Joint Petition discusses why the County Commissioners for Ouray, Delta and Montrose Counties selected KTSC(TV) to provide such service to the Western Slope rather than other local noncommercial, educational television stations. Joint Petition at 4. See also Affidavit of Gregory Sinn ("Sinn Affidavit"), executed September 3, 1992, Joint Petition Exhibit 1, at 1-2, 4.

The swap will also facilitate technical enhancement of KTSC(TV)'s operations.^{15/} The University will receive the dual thirty kilowatt cross-polarized transmitter currently used by SCC in its operation of KOAA-TV. The use of this transmitter will allow KTSC(TV) to place a stronger, better quality signal over Colorado Springs and Pueblo; moreover, due to its dual capacity, this transmitter is more reliable than KTSC(TV)'s present transmitter.^{16/}

The University would also acquire Television Translator Station K30AA, Colorado Springs, Colorado, from SCC. Television Translator K30AA will provide KTSC(TV) with broader coverage of El Paso County^{17/}; as a result, KTSC(TV) will be better able to serve Colorado Springs.^{18/}

Finally, not only will the University receive material service benefits from the swap proposal presented in the Joint Petition, but SCC, by relocating

^{15/} Pikes Peak erroneously states that the "only benefit" received by the University through the channel exchange is a monetary contribution. Pikes Peak Comments at 8. To the contrary, as demonstrated at pages 5-6 of the Joint Petition and discussed herein, the University will also receive technical operational benefits for purposes of improving the service provided by KTSC(TV).

^{16/} Sinn Affidavit, supra note 14, at 1.

^{17/} Presently, the University supplements its service to Colorado Springs through rebroadcast of KTSC(TV) on the facilities of Television Translator K15BX, Colorado Springs, Colorado, pursuant to special temporary authority.

^{18/} In fact, five years ago when Pikes Peak opposed SCC's efforts to acquire Station KPCS(TV), Pueblo, Colorado as a satellite, it argued that KOAA-TV, via Translator K30AA, provided a better quality signal than KTSC(TV) to most parts of Colorado Springs. See Pikes Peak Petition to Deny Assignment of Construction Permit for KPCS(TV), Pueblo, Colorado (FCC File No. BAPCT-880226KH), filed April 11, 1988, at 14, n.17.

KOAA-TV's transmitter to a site atop Cheyenne Mountain, will be also able to provide a more fully competitive signal to the entire Colorado Springs-Pueblo television market.

Notably, civic and community leaders in the Colorado Springs-Pueblo market have confirmed the proposed swap's public interest benefits and stated their unconditional support of the swap. This public support is not only on the local level (including the mayor of Colorado Springs, the president of the Colorado Springs Chamber of Commerce and the President of the Latino Chamber of Commerce of Pueblo) but also on the federal level (including both United States Senators and Congressmen from the State of Colorado).^{19/} Given that these individuals are

^{19/} Attached hereto as Attachment A are letters submitted in support of the channel exchange as proposed by SCC and the University by Robert M. Isaac, Mayor of Colorado Springs (noting that "as a whole, the residents of Colorado Springs, Pueblo and the Western Slope will be better off as a result of the swap"); John Fowler, President of the Colorado Springs Chamber of Commerce (stating that swap "would provide significant benefit [to] both stations and the communities involved"; Dr. Michael Ortiz, President of the Latino Chamber of Commerce of Pueblo (commenting that swap "involves revenue enhancement for the University ... to strengthen noncommercial programming and to provide extended coverage and would benefit the viewers in [Colorado Springs]"); Joel Hefley, Representative for the Fifth District of Colorado, U.S. Congress (indicating "increased service to residents in Pueblo and Colorado Springs, stronger educational television service, and placement of KOAA-TV on equal footing with other commercial television licensees" to be swap benefits); Hank Brown, U.S. Senator (Colorado) (stating that swap would "strengthen educational television service to the region" and "strengthening KOAA-TV's signal...putting it on equal footing with its commercial competitors"); Scott McInnis, Representative for the Third District of Colorado, U.S. Congress (noting that swap would result in "strengthening educational television service to the region" and "strengthening KOAA-TV's signal...putting it on equal footing with its commercial competitors"); and Ben Nighthorse Campbell, U.S. Senator (Colorado) (stating that

(continued...)

charged with the responsibility of representing the interests of residents of the two principal cities of the Southern Colorado region, their strong support of the proposed channel exchange must play a critical, decisional role in the Commission's deliberations in this proceeding.^{20/}

In sum, as demonstrated by Petitioners and recognized by civic and community leaders, the channel swap would clearly enhance the public service capabilities of both the University and SCC. The Petitioners' channel exchange proposal -- affording mutual benefits to both KTSC(TV) and KOAA-TV -- is not only in the public interest because of the direct service benefits of the exchange but is also consistent with the Commission's goals underlying its channel exchange procedures.

19/ (...continued)

the swap would "help the University amplify KTSC-TV's noncommercial programming and expand its television translators to Colorado's Western Slope" and "put KOAA-TV ... on par with other commercial stations and would improve its access to more Coloradoans").

20/ Unlike the leaders of the Colorado Springs community, KKTU claims at page 20 of its Comments that the people of Colorado Springs will not enjoy any meaningful public interest benefits from the proposed swap. The error in this assertion is obvious: there will be a gain over presently existing service and the public will also receive the benefits associated with \$1 million in educational television funding.

**Inclusion of the Cheyenne Mountain Permit
Is Critical to the Public Interest Associated
With the Proposed Channel Exchange**

When the Commission initially proposed its current channel exchange procedures, it contemplated that both swap proponents would use such procedures as a vehicle to obtain certain benefits. In fact, the Commission noted that these procedures would "encourage its licensees to upgrade their facilities and quality of service."^{21/} It indicated that through channel exchanges "[b]oth commercial and noncommercial licensees could significantly improve service to their audiences."^{22/} The Commission also noted that under its channel exchange procedures, "both commercial and noncommercial licensees can and would bargain in order to secure the most favorable terms possible to improve their operations."^{23/} When it adopted its present channel exchange procedures, the Commission re-emphasized the importance of service benefit to commercial swap proponents, stating that "[i]ntra-band exchanges are desirable because such exchanges may benefit both of the stations involved, with consequent advantages for the public."^{24/}

^{21/} Channel Exchange NPRM, *supra* note 5, at ¶ 11.

^{22/} *Id.* (emphasis added).

^{23/} *Id.* (emphasis added).

^{24/} Amendments to the Television Table of Assignments to Change Noncommercial Reservations (the "Channel Exchange Report & Order"), 59 RR 2d 1455, 1461 (1986) (emphasis added), recon. denied 3 FCC Rcd 2517 (1988).

Not only did the Commission contemplate that commercial as well as noncommercial stations would benefit from channel exchanges, its approval of previous swaps confirms that this has in fact been the case. Indeed, even before it adopted its current channel exchange procedures, the Commission approved a swap involving two New Orleans, Louisiana VHF stations.^{25/} In doing so, the Commission enabled the commercial licensee to expand its coverage to areas outside of the New Orleans metropolitan area and thus to become more competitive with other area commercial television stations.^{26/} Notably, the commercial station's service area was previously limited because it was required to provide equivalent protection to a co-channel Jackson, Mississippi television station to which it was short-spaced by 30 miles.^{27/}

Almost a decade later, the Commission approved a channel swap involving a noncommercial UHF station in San Mateo, California and a commercial UHF station in San Francisco, California.^{28/} As a result, the commercial licensee, operator of a Spanish language station, was able to improve its coverage to a significant portion of the area's Spanish language population because of new

25/ See Amendment of Section 73.606(b) of the Commission's Rules and Regulations (New Orleans, Louisiana), 17 FCC 2d 419 (1969) ("New Orleans, Louisiana").

26/ Id. at 420.

27/ Id.

28/ See Amendment of Section 73.606(b) (San Francisco and San Mateo, California), 68 FCC 2d 860 (1978), ("San Francisco and San Mateo, California").

equipment which it could use on its post-exchange channel but not on its pre-exchange channel.^{29/}

Significantly, the Commission's modification of its channel exchange procedures did not change the fact that successful commercial swap proponents routinely receive some type of service benefit. For instance, the first swap evaluated and approved under the Commission's current channel exchange procedures involved two Gary, Indiana UHF stations.^{30/} That swap involved the commercial permittee's relocation to the Sears Tower in Chicago, Illinois.^{31/} As a result of the proposed "new" transmitter site location for its transmitter site, the Gary commercial station (the sole commercial television station allocated to that community) would become more competitive with Chicago stations which also served Gary. Although the Commission's minimum distance separation requirements prohibited the commercial permittee from moving its transmitter site to the Sears Tower on its pre-swap channel, the Commission nonetheless approved the channel exchange.

In their comments, the Commercial Competitors characterize SCC's request for inclusion of the Cheyenne Mountain Permit as a "circumvention" of the

^{29/} Id. at 862.

^{30/} Amendment of Section 73.606(b) (Gary, Indiana), MM Docket No. 86-80, RM-5303, 51 FR 30364, published August 26, 1986, petition for recon. dismissed 1 FCC Red 975 ("Gary, Indiana").

^{31/} Id.

Commission's minimum spacing rules.^{32/} However, SCC is no different from the commercial permittees in Gary, Indiana or New Orleans, Louisiana which, by virtue of the Commission's approval of their swaps, were able to improve their service in a manner which was not permitted on their pre-swap channels due to the Commission's minimum spacing rules. The Commission did not consider their efforts to improve the service of their stations by means of a channel exchange to be improper, and it should not do so here.

In sum, precedent confirms that the service benefit sought by SCC from the channel exchange proposal -- competitive equity associated with relocation of its transmitter to the same antenna farm used by other market stations -- is a legitimate goal virtually identical to benefits received by commercial licensees in previously-approved swaps. SCC's insistence on the inclusion of the Cheyenne

^{32/} KKTU Comments at 16; Pikes Peak Comments at 9. Pikes Peak further states that the Commission's exclusion of the Cheyenne Mountain Permit is evidence of the Commission's recognition that it is "abundantly clear" that SCC is using the Commission's channel exchange procedures as a vehicle to "circumvent" its minimum distance separation rules. Pikes Peak Comments at 3. What is abundantly clear is that Pikes Peak's comments do not provide a fair and accurate reflection of the Commission's statements in the Notice. The Commission explicitly stated its reason for not including the Cheyenne Mountain Permit in the swap: the University had not yet implemented it. Notice, supra note 2, at ¶ 7. (The University's amended extension application explains and justifies its implementation of the Cheyenne Mountain Permit.) The Notice contains no reference to SCC nor any mention of the Commission's minimum distance separation rules; rather, its sole focus is on the University and its actions with respect to the Cheyenne Mountain Permit. Id.

Mountain Permit is thus fully in accord with similar requests made by previous swap proponents and the Commission's grant thereof.^{33/}

**The Proposed Channel Swap Will
Result In A Net Improvement of Service**

The Joint Petition included engineering data pertaining to the service losses and gains associated with the approval of the proposed channel exchange. Specifically, Petitioners demonstrated that by moving to Channel 5 and using SCC's present transmitter, KTSC(TV) would enjoy a service gain of 5,393 persons.^{34/} This figure did not include KTSC(TV)'s proposed use of Television Translator K30AA, which would result in an additional gain of 211,633 persons. As a result, the total service gain to KTSC(TV) associated with the channel exchange -- excluding

^{33/} See e.g. Amendment of Section 73.606(b) (Boca Raton and Lake Worth, Florida) (Notice of Proposed Rule Making), MM Docket No. 93-234, RM-8289, released August 26, 1993; Amendment of Section 73.606(b) of the Commission's Rules (Clermont and Cocoa Beach), 4 FCC Rcd 8320 (M. Med. Bur. 1989), aff'd Rainbow Broadcasting Co. v. FCC, 69 RR 2d 1572 (D.C. Cir. 1991) (where the commercial permittee stated that it was only interested in implementing the swap proposal if the Commission approved its use of a specific transmitter site located at a nearby "de facto" antenna farm); Gary, Indiana, supra note 30; San Francisco and San Mateo, California, supra note 28; New Orleans, Louisiana, supra note 25.

^{34/} This service gain estimate is greater than that indicated in KKTv's comments because it is given in terms of the number of persons receiving KTSC(TV)'s signal, as a result of the swap rather than those who will receive first primary, noncommercial service. See Joint Petition Engineering Statement, supra note 10, at Appendix A; KKTv Comments at Exhibit 1.

the service gain from the proposed translators for the Western Slope -- is 217,026 persons.^{35/}

As indicated in the Joint Petition, SCC's implementation of the Cheyenne Mountain Permit would result in certain areas no longer receiving KOAA-TV's signal off-the-air.^{36/} Exhibit 1 of the Engineering Statement attached hereto as Attachment B indicates the total population included in these areas to be 17,901 persons.^{37/} KKTU contends that this service loss must be fatal to the swap proposal.

Preliminarily, it should be noted that the Commission has already decided that the service loss associated with implementation of the Cheyenne Mountain Permit can be reconciled with the public interest. In particular, KTSC(TV)'s implementation of the Cheyenne Mountain Permit would have involved

^{35/} The service gain resulting from the University's proposed translator service to the Western Slope is discussed infra.

^{36/} These service losses are in areas where KOAA-TV has limited service obligations, for less than its obligation to Colorado Springs, the largest community in its home market where its service obligations are merely "secondary." See tvUSA/Pueblo, Ltd., 4 FCC Rcd 598 (1989), aff'd FCC 90-358 (December 5, 1990).

^{37/} See Attachment B (Engineering Statement of Cohen, Dippell & Everist, P.C.). By contrast, the Joint Petition indicated a loss area of 21,872. See Joint Petition Engineering Statement, supra note 10, at Appendix A. The KOAA-TV Joint Petition service loss estimate was based on the use of a Jampro antenna. However, as indicated in the University's most recent amendment to its application requesting extension of the Cheyenne Mountain Permit, the University has ordered an antenna from Dielectric Communications, Inc. (An amendment reflecting the technical changes associated with the new antenna will be filed with the Commission shortly.) By virtue of this change in antennas, the KOAA-TV service loss is reduced to 17,671 persons nearly all of whom will receive KOAA-TV via cable, satellite or new translators. See Engineering Statement (Attachment B).

a service loss of 19,599 persons. The Commission nonetheless granted the permit, indicating that the largely unpopulated nature of the affected area obviated any adverse public interest impact.^{38/} KOAA-TV's implementation of the Cheyenne Mountain Permit, which would involve virtually the same type of service loss, must likewise be consistent with the public interest: the issue of service loss is, in effect, res judicata.

Notwithstanding the Commission's prior resolution of the issue, KKTv contends that any service loss resulting from the channel exchange is a reason to reject it. Commission precedent, however, dictates otherwise.

The Commission has previously held that the availability of alternative video services such as proposed and existing translator service and cable television to those persons residing in a would-be "white area" is sufficient evidence that such service loss would be either minimized or eliminated.^{39/} As shown in Exhibit 1 and discussed below, due to proposed and existing translator service, the actual primary,

38/ See Letter to Thomas Aube from Barbara A. Kreisman (February 28, 1991).

39/ See KTVO, Inc., 57 RR 2d 648 (1984); Elba Development Corporation, 5 FCC Rcd 6767 (1990) (prior history omitted), application dismissed 6 FCC Rcd 1564 (1991) (reiteration of policy that evidence regarding availability of cable, translators and the viewing of other television stations beyond their Grade B contour is acceptable for purposes of demonstrating elimination or reduction of white areas); Coronado Communications Company, 8 FCC Rcd 159, (1992) (areas where translator service and cable television are available can be excluded in calculation of loss area); Daytona Broadcasting Company, Inc., 59 RR 2d 1303, 1305 (1985); Apogee, Inc., 59 RR 2d 941, 945 (1986); Tele-Broadcasters of California, Inc., 58 RR 2d 223, 232, n.38 (Rev. Bd 1985) (recognition of cable television as "tantamount to 'white area' television service").

off-air commercial service loss resulting from KOAA-TV's proposed channel change and transmitter site relocation will be only 1,463 persons,^{40/} clearly a de minimis number. Moreover, cable service is available in virtually all of the loss area, as is DBS service. The actual practical loss area is thus even smaller than the loss calculated using only off-air service.

As indicated the Engineering Statement, SCC proposes to construct and operate five translators in areas which would lose service following KOAA-TV's implementation of the Cheyenne Mountain Permit.^{41/} These translators would be located in Otero County, Las Animas County, Huerfano County, Saguache County, Fremont County. (There is an existing translator, K02AC, in Las Animas County which already retransmits KOAA-TV.)^{42/} Use of these translators will provide service to 16,438 persons, thus reducing the loss area to 1,463 persons.^{43/}

^{40/} KKTU submits that 2,216 persons would lose their sole off-air commercial television service. KKTU Comments at 7. However, KKTU does not indicate whether cable is available to any of these persons. The Commission has previously held that cable availability is relevant to the determination of whether a white area is created. See e.g. Elba Development Corporation, supra note 38, 5 FCC Rcd at 6767. Notably, all of the counties labelled by KKTU as experiencing a commercial service loss, either portions of them or in their entirety, are served by at least one cable system. See 1993 Television & Cable Factbook, Volume 61 (Cable), Copyright 1993, Warren Publishing Inc.; 1993 Cable & Station Coverage Atlas, Copyright 1993, Warner Publishing, Inc.

^{41/} See Attachment B at Table 1.

^{42/} Id.

^{43/} It should be noted that KKTU claims at Page 9 of its Comments that the cable and translator availability of other noncommercial stations undercuts the swap's

(continued...)

Cable availability reduces the loss area even further. Cable television systems operate in all of the counties in the loss area.^{43/} Because persons residing in these counties have access to cable, they must be excluded from service loss calculations.^{45/} Doing so eliminates the service loss. In short, any minor amount of service loss associated with the proposed swap is clearly de minimis if not non-existent.^{46/}

Because the channel exchange proposal involves both KTSC(TV) and KOAA-TV, the evaluation of associated service benefits must take account of the service impact on both stations. The service gains associated with KTSC(TV)'s move

^{43/} (...continued)
educational benefits. Apart from the fact that service from KTSC(TV) would be preferable to more distant or out-of-state educational stations, KKTV has thus recognized that cable and translators do in fact provide alternatives to off-air service which must be considered in calculating gains or losses. Pikes Peak has similarly recognized the effectiveness of cable in compensating for the lack of off-air service. See Pikes Peak's Petition to Deny, File No. BAPCT-880226KH (April 11, 1988) at 19.

^{44/} See 1993 Television & Cable Factbook, Volume 61 (Cable), Copyright 1993, Warren Publishing Inc.; 1993 Cable & Station Coverage Atlas, Copyright 1993, Warren Publishing, Inc.

^{45/} See e.g. KTVO, Inc., *supra* note 38, 57 RR 2d at 650; Elba Development Corp., *supra* note 38, 5 FCC Rcd at 6767; Tele-Broadcasters of California, Inc., *supra* note 38, 58 RR 2d at 232, n.38.

^{46/} As indicated at page 2 of the Engineering Statement, residents in the white area created by the SCC's implementation of the Cheyenne Mountain Permit also could have access to direct broadcast satellite (DBS) services. This DBS service, like cable television, is an alternative video delivery service in rural areas which can effectively offset loss of off-air video service. The de minimis loss thus can be further reduced after consideration of satellite service availability.

to Channel 5, which include an increase and improvement in the station's service of the Colorado Springs-Pueblo market and proposed translator service for the Western Slope, far exceed the de minimis service losses associated with KOAA-TV's move to Channel 8. Thus, the channel exchange would result in a net improvement of service.^{47/}

Notwithstanding, the swap's net service gains, KKTV cites KTVO, Inc., 57 RR 2d 648 (1984), to support its contention that the proposed channel exchange is not in the public interest because of a loss of primary commercial service. In KTVO, Inc., as quoted by KKTV, the Commission specifically recognized that service withdrawal or downgrading can be justified if there are offsetting public factors.^{48/} Here, the benefits to be received by the University -- the monetary contribution to be used to expand its translator network to the Western Slope and to enhance KTSC(TV)'s programming and technical improvements associated with KTSC(TV)'s move to Channel 5 -- clearly offset any minor service losses associated with KOAA-TV's proposed move to Channel 8. Moreover, these benefits would be supplemented by the more competitive service provided by KOAA-TV from a site

47/ KKTV's comments concede that there under the Notice's swap proposal would be a net service gain of 690 -- a gain of 2,906 to KTSC(TV) and a loss of 2,216 to KOAA-TV. Significantly, the Commission has not required a minimum service gain in determining whether a swap proposal is in the public interest. In any event, the net service gain recognized by KKTV does not take into account the service gains on the Western Slope or the other benefits associated with the swap proposal -- namely, the programming benefits and equipment supplied to the University.

48/ See KTVO, Inc., 57 RR 2d at 649.

atop Cheyenne Mountain. In other words, the proposed channel exchange is fully consistent with KTVO, Inc. in that the cumulative effect of associated benefits will far outweigh any actual primary commercial service loss.

KKTV's reliance on Coronado Communications Company^{49/} is also misplaced. KKTV omits from its excerpts of that case critical portions of the Commission's discussion which confirm that public interest benefits like those present here can offset service losses. Specifically, the Commission stated that "[a]lthough any loss of service is prima facie inconsistent with the public interest, it is our policy to consider and evaluate any counterbalancing factors an applicant may present to justify service losses."^{50/} The Commission further noted that "[t]his balancing process, to determine whether the projected loss of service will be outweighed by other factors, involves more than a mere comparison of numbers."^{51/} KKTV's wooden analysis ignores this instruction. As demonstrated above, there are major public service benefits which would accompany the channel swap and these clearly outweigh any minor associated service losses.

^{49/} 8 FCC Rcd 159 (1992).

^{50/} Id. at 162.

^{51/} Id. (emphasis added).

**The Noncommercial Service Gains Associated With
KTSC(TV)'s Proposed Translator Service Are Not Speculative**

The noncommercial service gains associated with KTSC(TV)'s expansion of its translator network to several communities located on the Western Slope of Colorado are a clear public interest benefit of the swap. The Commercial Competitors agreed with the Notice's suggestion that such service gains "may be too speculative to be considered benefits" because translators are a secondary service.^{52/} Here, however, the proposed translators' displacement is such an unlikely occurrence that the service gains resulting from their operation are properly factored into the channel swap's public interest equation.

The current status of Colorado channel allocations is the best indicator that the proposed Western Slope translator service is a concrete benefit of the swap. There are forty-seven television channels allocated to Colorado, seventeen of which are reserved for noncommercial stations in Colorado.^{53/} Nineteen of these allotments are vacant including 13 reserved for noncommercial use.^{54/} Eighteen of

^{52/} Notice, supra note 2, at ¶ 9. This position is directly contrary to the Commercial Competitors' praise of translators' capability when they were opposing KOAA-TV's application to acquire KPCS(TV) (FCC File No. BAPCT-880226KH). See e.g., KKTV's Reply to Opposition to Petition to Deny (June 8, 1988) at 11; Pikes Peak's Petition to Deny, supra note 18, at 12; KKTV's Opposition to Application for Review (March 3, 1989) at 18.

^{53/} 47 C.F.R. §73.606 (1992).

^{54/} These vacant channels are allocated to the following Colorado communities: Alamosa, Craig, Durango, Glenwood Springs, Grand Junction, Gunnison, La Junta, Lamar, Leadville, Montrose, Pueblo, Salida, Sterling and Trinidad. See 1993

(continued...)